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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 603

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Petitioner,

vs.

SIGNA JOHNSON, ADMINISTRATRIX OF THE ESTATE OF GEORGE JOHNSON, DECEASED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Daily Record Co., Baltimore 3, Md.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Baltimore and Ohio Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on December 18, 1953.

OPINIONS BELOW

The first opinion of the District Court (R. 224-229) is reported in 106 F. Supp. 166. The per curiam opinion of the Court of Appeals (R. 230), dismissing the first appeal as premature, is reported in 202 F. 2nd 149. The second opinion of the District Court following the trial on the issue of damages alone (R. 236-237) is unreported. The second opinion of the Court of Appeals (R. 242-248) is reported in 208 F. 2nd 633.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1953, and a petition for rehearing was denied on January 25, 1954. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the plaintiff in a civil action for damages, who has not otherwise established a prima facie case, is entitled under the law of the Commonwealth of Pennsylvania to have a jury pass upon the credibility of her own uncontradicted and unimpeached witness.

2. Whether the plaintiff in a civil action for damages, under the law of the Commonwealth of Pennsylvania, can sustain her burden of proof by selecting that portion of the testimony of her own witness which is favorable, and disregarding the balance thereof which is prejudicial.

STATEMENT OF THE CASE

This is a case governed by the local law of the Commonwealth of Pennsylvania. The respondent brought this action under the Fiduciaries Act of Pennsylvania (Purdon's

Pennsylvania Statutes Annotated, Title 20, Ch. 3 App. Sec. 772) to recover for an alleged wrongful death. The suit was filed in the Court of Common Pleas of Allegheny County (R. 1), and was removed to the United States District Court for the Western District of Pennsylvania on the basis of diversity of citizenship (R. 1). The case ultimately resulted in a jury verdict and judgment for the respondent in the amount of $16,000.00, which judgment the Court of Appeals for the Third Circuit has affirmed (R. 236-238, 249).

It is undisputed that the decedent, George Johnson, was shot and killed by Clyde Hall, who was employed by the petitioner as a railroad policeman acting within the scope of his employment at the time of the occurrence. The sole question at issue in the case is whether Hall was justified in killing the decedent in the reasonable belief that such act was necessary to save his own life (R. 243).

The only evidence as to the manner in which the shooting occurred came from the testimony of Clyde Hall, who was called as a witness by the respondent.* Hall testified that on the night in question he was assigned to the task of searching for trespassers, who were suspected of tampering with the air valves and thereby stopping trains, in the vicinity of Rosedale, Pennsylvania (R. 118-119). This is a felony under the laws of Pennsylvania (Purdon's Pennsylvania Statutes, Title 18, Section 4919). He started his tour of duty at the station at Uniontown, Pennsylvania, and from there drove to the Fayette Street crossing in Uniontown, where he stopped to observe a passing train (R. 91-95). At this point he saw a man, "who later turned

* Respondent did not seek to call Hall as a hostile witness or adverse party under Rule 43(b) F. R. C. P. (R. 90, 245).

out to be George Johnson," riding on the forty-ninth car from the rear of the train (R. 96-97). He then drove to Rosedale, and there left his automobile to check the same train as it passed that point. He again saw the rider, who at this time was standing over the coupler on one end of the car, with one hand in the vicinity of the air valve. When he saw the man, Hall started running along the ground on the right side of the train, which soon came to a stop. After the train stopped, he observed the man, through the openings between the cars, running back towards the Rosedale crossing on the opposite side of the train (R. 98-103). Hall crossed between two cars to the other side of the train, and at that time saw the man standing about fifteen feet from him. When the man saw Hall, he started running. Hall then got out his pistol and called to the man to halt in the name of the law, or he would shoot. The man ran faster, and Hall again called for him to halt, and fired a warning shot into the air. He chased the man back to the crossing and down Rosedale Road, away from the tracks, firing two more warning shots into the air. The man finally ran into the yard of a nearby house, and went behind a tree. Hall approached the tree and ordered him to come around it with his hands up. He did so, and the officer approached him from behind and started to put handcuffs on him, holding the handcuffs in his right hand and the gun in his left (R. 103-113). The man then swung around, knocking the handcuffs out of his hand, and hit Hall in the mouth. There was a scuffle and Hall fell to the ground. The next thing he knew, Hall was lying on his back on the ground, and the man was sitting astride his body with a knife raised over him (R. 113-115). Hall then shifted the gun from his left to his right hand and fired the fatal shot (R. 115). The deceased

was later identified as George Johnson (R. 44). Following the encounter, Hall was found to be badly cut about the face, head, and back and was hospitalized for treatment of these injuries (R. 67, 78, 81, 125, 127). Other of respondent's witnesses confirmed the fact that when he reported the incident shortly after it occurred, Hall's face and clothing were covered with blood (R. 67, 78, 81). A blood-stained knife and the handcuffs were found at the scene and the knife was exhibited in evidence, together with the officer's hat and jacket showing repaired cut marks (R. 65, 66, 125).

This is the only version of the shooting in the case. The respondent introduced no other evidence as to how the decedent met his death.

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred in that it failed to apply the law of the Commonwealth of Pennsylvania:

1. In holding that the credibility of the respondent's uncontradicted and unimpeached witness constituted an issue to be submitted to the jury.

2. In holding that the jury was entitled to accept that testimony of the respondent's witness which established the fatal shooting, reject his explanation of the circumstances, and speculate on other supposed motives and actions necessary to make a prima facie case.

3. In affirming the action of the District Court, in refusing to direct a verdict for the petitioner.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the law of Pennsylvania.

Federal jurisdiction in this case is based upon diversity of citizenship and the law of Pennsylvania is controlling. *Erie Railroad Co. v. Tompkins,* 304 U. S. 64. The matter is one of substance, for if the Court had followed the law of Pennsylvania a directed verdict for the petitioner would have been required. Despite that, the Court of Appeals, although giving lip service to the fact that the substantive law of Pennsylvania must control, proceeded to disregard it without citation or reference to any decisions of Pennsylvania. The Court looked for its authority to five text writers and the suggested Model Code of Evidence of the American Law Institute. Since *Erie Railroad Co. v. Tompkins,* supra, it has not been within the province of a federal court to substitute its views for that of the highest courts of a state in matters of local law.

The decision of the Court of Appeals is directly in conflict with the uniform holdings of the Supreme Court of Pennsylvania, which have established that the testimony of any witness must stand as verity unless it is impeached or rendered inherently improbable *by facts or circumstances appearing in the evidence.** *Dunmore v. Padden,* 262 Pa. 436, 105 A. 559; *Felski v. Zeidman,* 281 Pa. 419, 126 A. 794; *Burke v. Kennedy,* 286 Pa. 344, 133 A. 508; *Morningstar v. Northeast Pennsylvania Railroad Co.,* 290 Pa. 14, 137 A. 800; *Krell v. Jacobson,* 314 Pa. 522, 172 A. 697; *Mat-*

* The District Court has completely reversed the order and meaning of this rule by suggesting that the uncontradicted testimony could not stand unless the Court could find that it was inherently *probable* (R. 227).

thews v. Derencin, 360 Pa. 349, 62 A. 2nd 6. A party calling a witness is bound by the testimony given in so far as he has not attempted to discredit it by other competent evidence. He cannot select that part of the testimony which is favorable, and ask that the balance be disregarded. *Dunmore v. Padden, Morningstar v. Northeast Pennsylvania Railroad Company,* supra. The Pennsylvania rule with respect to the effect to be given the testimony of a party's witness, is clearly stated in *Krell v. Jacobson, et al.,* 314 Pa. 522, 527, 172 A. 697, 699:

> "We have often decided that if one of the litigants calls his adversary to testify as upon cross-examination, while the testimony thus obtained is not conclusive on the former, but may be rebutted by other proof, yet to the extent that it is not rebutted it is conclusively taken to be true."

Respondent made no attempt to rebut any part of Hall's testimony.

The Court of Appeals has affirmed a verdict and judgment which is necessarily based upon speculation and conjecture, disregarding the law of Pennsylvania and the prior decisions of this Court. *Ranck v. Sauder,* 327 Pa. 177, 193 A. 269; *Whigham v. Metropolitan Life Insurance Co.,* 343 Pa. 149, 22 A. 2nd 704; *Pennsylvania Railroad Co. v. Chamberlain,* 288 U. S. 333; *Galloway v. United States,* 319 U. S. 372, 395; *Moore v. Chesapeake and Ohio Railroad Co.,* 340 U. S. 573, 578. The courts below have suggested that some of the testimony might not be believed. But mere disbelief of testimony does not supply the lack of affirmative proof. *Ranck v. Sauder,* 327 Pa. 177, 193 A. 269; *Mock v. Furphy,* 172 Pa. Super. 226,* 92 A. 2nd 699; *Bunt v. Sierra*

* As the Court in this case stated, p. 700: "The rejection of his testimony, because of its incredibility, does not supply the lack of affirmative testimony to meet the burden placed upon plaintiffs."

Butte Gold Mining Co., 138 U. S. 483, 485; *Moore v. C. & O. R. Co.*, 340 U. S. 573, 576. The only evidence in the case shows conclusively that Hall shot in self-defense. Any contrary finding is a product of the imagination.

The basic error lies in the fact that the Court of Appeals has completely ignored the *burden of proof* which is fundamental in the law of Pennsylvania and in the whole common law system of jurisprudence. As the Court said in *DeReeder v. Travelers Insurance Co.*, 329 Pa. 328, 333-334, 198 A. 45, 47:

> "The burden of proof resting upon plaintiffs in civil actions cannot be met by conjecture. The phrase 'burden of proof' means exactly what it says. * * * In a civil case the evidence and circumstances on which plaintiff relies and the inference logically deducible therefrom must so preponderate in favor of the basic proposition he is seeking to establish as to exclude any equally well-supported belief in any inconsistent proposition."

The plaintiff in this case was attempting to establish a wrongful shooting. There was a complete failure of proof on that issue, and for that reason there were no questions for the jury to pass upon. Both the District Court and the Court of Appeals have conceded that *without the testimony of Hall "there was not a sufficiently clear outline of the facts and circumstances to give the jury anything to pass upon"* (R. 244). At the same time, neither court has pointed to any other testimony or evidence or reasonable inferences therefrom which would tend to show that the shooting occurred in any different manner.

2. The question is of vital importance in the trial of all civil actions.

The importance of the issues here involved is not limited to the peculiar factual situation or to the interests of the petitioner in correcting what it believes to be an unjust result. The obvious conflicts with the controlling Pennsylvania cases and the fundamental errors in the decision are upon basic rules of evidence and standards of proof which are vital to the administration of justice in every civil action.

Under the rule of this case as it now stands, it is no longer necessary for the plaintiff in a civil action to prove his case. The decision plainly holds and may be cited as authority for the proposition that a jury must pass upon Plaintiff's uncontradicted and unimpeached testimony which favors the defendant and may return a verdict which is directly contrary to all the evidence. This is not the law of Pennsylvania, and in the exercise of its power of supervision, this Court should not allow it to become the law of the federal courts in the Third Judicial Circuit.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 25, 1954.